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18 IN THE UNITED STATES DISTRICT COURT
19 FOR THE NORTHERN DISTRICT OF CALIFORNIA

20 ALEX ANG and LYNNE STREIT,
21 individually and on behalf of all others
similarly situated,
22 Plaintiffs,
23 v.

24 BIMBO BAKERIES USA, INC.,
25 Defendant.

Case No. 13 Civ. 1196 (WHO) (NC)

**JOINT STATEMENT REGARDING
DISCOVERY ISSUES**

Judge: Hon. Nathanael M. Cousins
Hearing: June 11, 2014 at 1:00 p.m.
Courtroom: A, 15th Floor

26
27 Plaintiffs Alex Ang and Lynne Streit (collectively, "Plaintiffs") and defendant Bimbo
28 Bakeries USA, Inc. ("Defendant" or "BBUSA") respectfully submit this joint statement.

DEFENDANT'S POSITION

BBUSA is diligently attempting to comply with every aspect of the Order, but it simply needs more time to do so, for the following reasons.

A. BBUSA's Compliance with Parts 1 and 3 of the Order

The parties' prior briefing and argument regarding Parts 1 and 3 of the Order ("Pre-Class Period Discovery" and "Non-California Products," respectively) were focused on the discoverability of such information and did not address e-discovery issues, much less the amount of time that it would take for BBUSA to actually produce responsive documents. Nevertheless, the Court set a 14-day deadline for BBUSA to produce all documents, and for the following reasons BBUSA respectfully requests a reasonable extension of time to comply.

Almost every request within the scope of Parts 1 and 3 of the Order is subject to e-discovery under Rule 26(b).¹ Indeed, virtually all responsive information will exist within BBUSA's electronic systems. Accordingly, after the Court issued the Order, BBUSA drafted and exchanged a proposed e-discovery protocol and search criteria, including the identity of custodians, sources of data, and terms and connectors that are likely to yield responsive information. However, the parties have not yet reached an agreement on the protocol (much less how the e-discovery costs will be shared).² The meet and confer process is critical to the effective production of e-discovery. *See generally, Moore v. Publicis Groupe & MSL Group*, 287 F.R.D. 182, 193 and *passim* (S.D. N.Y. 2012). That process alone could take several weeks. ***Yet the plaintiffs have offered just one month to complete the entire process and produce all e-discovery.*** Given the complexities of e-discovery, this deadline is simply not workable.³

¹ Plaintiffs broadly seek, for example, "all documents relating to the labeling or packaging" of the products at issue (RFP No. 1), "all documents relating to food labeling requirements" that relate to the products at issue (RFP No. 5), and "all documents relating to the difference in pricing" between the products at issue and competing products (RFP No. 73). Even after this Court dismissed from the litigation certain categories of products, this case still involves no less than 34 products, some of which are sold throughout the nation.

² Any argument that BBUSA delayed drafting the e-discovery protocol is misplaced. BBUSA could not have drafted the protocol and search terms before the Court ruled on these fundamental questions regarding the scope of discovery in this case.

³ *Vasudevan Software, Inc. v. Microstrategy Inc.*, 2012 WL 5637611, *5 (N.D. Cal. Nov. 15, 2012) (simply agreeing on the e-discovery search protocol "is often no easy task"); *William A. Gross Const. Assocs. v. American Manufacturers Mut. Ins. Co.*, 256 F.R.D. 134, 135 (S.D. N.Y.

Once the protocol is in place, an e-discovery vendor will likely need to (i) apply the search criteria to certain BBUSA computers, and likely to its central servers and any back-up tapes (which will likely result in hundreds of thousands of document “hits”), (ii) perform quality control on the resulting data set, and (iii) prepare the data for outside counsel’s review. *Moore, supra*, *193. BBUSA then must review the data for responsiveness, privilege, duplication and confidentiality⁴ before processing and producing it. This is not simply an electronic exercise; at various points attorneys and paralegals will need to ensure the search criteria are returning valid results and will have to make final privilege determinations. BBUSA will complete this process diligently and in strict compliance with the Order, but given the scope of the requests and the varied sources of responsive information, the initial gathering and processing of the data alone may take 6 to 8 weeks, and the review process is anticipated to take another 30 days.

Further complicating the timeline, during the parties’ meet and confer it became apparent that the parties dispute whether BBUSA must produce documents related to just the products at issue in this case, or with respect to *all* BBUSA products and sub-products, which number in the thousands. This issue obviously has major implications on the scope and timing of e-discovery if BBUSA must search for, and review, for instance, any documents related to the use of “100% Whole Wheat” or “good source of whole grains” across literally thousands of unique UPCs (“Universal Product Codes”). If this issue is truly in dispute, and especially if it must be resolved by the Court, it will further delay the parties’ agreement on search terms, and will substantially expand the volume of data that must be reviewed.

For all of these reasons, BBUSA respectfully requests that the Court set July 28, 2014 as the deadline for BBUSA to report to the Court and the plaintiffs regarding the status of its compliance with Parts 1 and 3 of the Order. In the alternative, BBUSA requests a 90-day extension of the deadline to comply with Parts 1 and 3 of the Order, to August 28, 2014. This modest extension will not prejudice the plaintiffs, particularly since just last month the plaintiffs

2009) (agreeing upon the protocol entails a “complexity” requiring that the parties “truly go where angels fear to tread”).

⁴ The parties are also in the process (begun last week) of negotiating a protective order regarding confidential and trade secret information.

obtained a six-month continuance of the trial in this action (now set for *November, 2015*).

B. BBUSA's Compliance with Part 2 of the Order

Following a meet and confer, the parties have agreed that BBUSA may have until June 18, 2014, to produce documents in compliance with Part 2 of the Order regarding "Financial Information." BBUSA has three employees assigned to this project who have spent many hours compiling responsive reports and conferring with BBUSA's counsel to ensure that the reports cover every product at issue for the relevant geographies and timeframes. The reports are generated based on a set of UPCs, there can be over 5 unique UPCs for any given product named in the complaint, and the product descriptions in BBUSA's systems do not necessarily match the names in the complaint. Nevertheless, BBUSA anticipates that it will be able to comply with Part 2 of the Order by no later than June 18, 2014 (subject to the pending protective order), and the plaintiffs have agreed to this extension.

C. BBUSA's Supplemental Discovery Responses

The parties have agreed that BBUSA may serve its supplemental responses to the plaintiffs' interrogatories and document requests by no later than June 10, 2014.

PLAINTIFFS' POSITION

In an effort to work with Defendant, and as a demonstration of their good faith, subject to the Court's approval, Plaintiffs will consent to Defendant's request that the deadline by which Defendant must produce requested financial information be extended until June 18, 2014.⁵ However, Plaintiffs do not agree to an additional extension of three months of the time by which Defendant must produce all other responsive documents. Plaintiffs should not have to wait a total of seven months to first receive requested documents. Plaintiffs will, however, agree to a one month extension until June 30, 2014.

Plaintiffs first requested the documents at issue on January 24, 2014. Since then, Defendants have taken measures to frustrate and delay Plaintiffs' discovery efforts. Because of

⁵ During a meet and confer held on June 3, 2014, Plaintiffs also agreed to extend to June 10, 2014, the time by which Defendant may serve amended responses to Plaintiffs' document requests and interrogatories.

1 Defendants' refusal to produce most of the requested documents, in order to compel production of
2 these documents, Plaintiffs had to make four submissions to the Court on March 13, 2014 (Dkt. #
3 57), April 2, 2014 (Dkt. # 65), April 9, 2014 (Dkt. # 68), and April 30, 2013 (Dkt. # 76). Further,
4 at the hearing held on April 16, 2014, the Court explicitly ordered that: "If there are documents
5 that they [Defendant] are agreeing to produce and they are not in dispute, those documents should
6 be produced within 14 days." *See* Transcript (Dkt. # 81) at 8. There are many responsive
7 documents that Defendant did initially agree to produce. However, other than certain pictures of
8 packaging produced with Defendant's initial disclosures, no other documents were produced
9 within that 14-day period, or at any point thereafter. Then, by Order dated May 14, 2014 (Dkt. #
10 80), the Court directed Defendant to produce almost all documents that Plaintiffs had sought by
11 no later than May 28, 2012. There has been no stay of any discovery deadline imposed by the
12 Court. While Defendant claims it was caught off guard by the Court's short deadlines,
13 Defendant's position necessarily begs the question of what they have been doing for the past four
14 and a half months with respect to actually producing documents requested in January.

15 Further, Defendant now finds itself in a trap of its own making. Despite Plaintiffs'
16 position to the contrary, Defendant fought hard for the shortest possible discovery schedule it
17 could get. Now, unless Defendant agrees to extend that discovery schedule, there is insufficient
18 time to afford Defendant an additional three months to first produce documents. The parties have
19 a limited amount of time to conduct fact and expert discovery and prepare for class certification.
20 Defendant demanded that Plaintiffs complete discovery within this time frame and Defendant,
21 too, must operate within these finite parameters.

22 Discovery was originally scheduled to close on May 1, 2014. Because of multiple
23 motions to dismiss brought by Defendant that were not resolved until April 2, 2014, and because
24 of the aforementioned discovery delays, Judge Orrick recognized a need to adjust the schedule
25 and directed the parties to address the issue in a joint case management statement. *See* Dkt. # 59.
26 Plaintiffs recognized the potential complexities of discovery in this case and requested a twelve-
27 month extension of the schedule. *See* Dkt. # 74 at 12-13. Defendants opposed such an extension
28 and pushed hard for the shortest possible schedule. *Id.* Judge Orrick ultimately extended the

1 schedule by six months and Plaintiff's class certification motion is presently due January 28,
2 2015. *See* Dkt. # 75. There is simply no room to fit such a generous period of time to produce
3 this first set of documents. Presumably, it will also take considerable time for responses to
4 subsequent document responses. This will not work.

5 Additionally, to the extent Defendant complains of a lack of an e-discovery protocol or
6 protective order, Defendant claimed to have been drafting an e-discovery protocol since at least
7 April, but did not provide Plaintiffs with a draft until June 2, 2014.⁶ Defendant should not benefit
8 from its own tardiness. As for a protective order, Plaintiffs encourage Defendant to execute the
9 form protective order of the Northern District of California, but the parties continue to negotiate
10 over terms.

11 Finally, Defendant alludes to another discovery dispute that Plaintiffs expect will have to
12 be resolved by the Court. In a prior submission to the Court, Plaintiffs sought to compel
13 production of documents relating to the specific unlawful labelling practices alleged in the
14 complaint, even if those documents did not relate to a particular product at issue. *See* Dkt. # 65 at
15 2:17-21. For example, a document discussing Defendant's use of the American Heart
16 Association Heart-Check Mark generally and without respect to a particular product would be
17 relevant. During a Court-ordered meet and confer, Defendant agreed to produce such documents
18 and Plaintiff did not include that request for relief in the parties' next joint statement to the Court.
19 *See* Dkt. # 68. Defendant now asserts that it never agreed to produce such documents. Plaintiffs
20 intend to request Court intervention with respect to this issue shortly.

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28 ⁶ Plaintiffs are reviewing that draft, however, it requires substantial revisions and the
elimination of certain one-sided provisions.

1 Dated: June 4, 2014

Respectfully submitted,

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